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HOME RULE FOR CITIES¹

DELOS F. WILCOX

IN reading Professor McBain's paper, it occurred to me that, in common with most other home-rulers, he had been misled by the fact that we usually personify our cities as females and had come to the conclusion that government is clothes; that a municipal home-rule charter is a code of fashions. Ever since reading the celebrated witticisms of Professor Teufelsdröckh on the subject of clothes, I have had the greatest respect for them. They are of the greatest importance. It is especially important for us to have such clothes that we can work in them. As you know, some clothes make work very difficult, while others make us very uncomfortable unless we work while we have them on. It is from this point of view alone that the discussion of the clothes, the fashions, the forms of municipal government, as an essential factor of home rule, is important. I think that more important than the right to choose between the commission form of government and the city-manager plan, more important than the right to frame a charter controlling the details of special assessments, the organization of the police force, and so forth, is the right to *do things*.

The fundamental question in this home-rule proposition is this: Shall we continue the American policy from which we have been trying to get away, in our academic discussions at least, for the past twenty years, of considering that municipalities have only those rights which are specifically expressed in their charters, granted by the legislature; or shall we reverse that process and give to cities, by a broad grant of general power, applicable alike to cities which frame their own charters and to other cities, the right to control their local affairs?

I confess that it is not easy, as Professor McBain has said, actually to formulate a home-rule clause that will prevent the cities from becoming *imperia in imperio*, and at the same time

¹ Discussion at the meeting of the Academy of Political Science, November 20, 1914.

prevent the legislatures of the states from unduly interfering with the exercise of municipal functions.

Two or three days ago, in Baltimore, the committee on municipal program of the National Municipal League had a meeting, and as Professor Lindsay asked me to discuss this question somewhat from the point of view of that committee, I want to read to you the declaration of powers which that committee tentatively recommended for inclusion in the constitutions of the states. Though as yet unable to agree upon the specific restrictions to be placed upon the exercise of these powers, we were able to agree that the cities should, to begin with, have a broad, sweeping, general grant, somewhat as follows:

Cities and villages shall have, and are hereby granted the power to borrow money and levy taxes and assessments; to control, perform and furnish all public services, and appropriate or otherwise acquire, hold, manage, control, lease and dispose of property, either within or without their corporate limits, for such purposes and for the protection and preservation of public improvements, by excess condemnation, or otherwise; to issue and sell bonds on the security of such property, or of the earnings thereof, or of both; to adopt and enforce local police, sanitary and other similar regulations, not in conflict with general laws; to do whatever they may deem necessary or proper for the safety, health, convenience and general welfare of their inhabitants, and to exercise all other powers of local self-government.

It seems to me that we ought to insist in this state, as in any other state where home rule is a serious issue, upon putting into the constitution some general grant of powers at least as specific and comprehensive as this one. No doubt we shall have to formulate some modifying clause. In the first place, unrestricted home rule may run amuck, in that the cities may try to arrogate to themselves those things which are properly state functions. They might even try to control matters of crime, which are properly controlled by the state law, and in the regulation of which the entire state has a fundamental interest. In the second place, with absolute home rule, there is danger that the cities in this generation may give away the

treasures of future generations. Therefore, home rule must be subject to two kinds of restrictions; one, to protect the people of the state, and the other, to protect future generations in the city itself.

I want to read you a tentative provision covering the first of these difficulties, which, however, is not presented with the authority of the National Municipal League committee, because, as I said, thus far we have been unable to agree upon just what should be done in the way of restrictions:

Such powers shall not be exercised in conflict with the provisions of this constitution [referring to possible limitations in other portions of the constitution] and shall be subject to such specific limitations and restrictions as may hereafter be imposed by general law, applicable alike to all the cities, or to all the villages of the state; but the enumeration of particular powers herein, or in any general law, shall not be deemed to limit or restrict the general grant of powers herein conferred.

Under this provision cities, having received a full grant of powers, may exercise the initiative in doing anything that they desire to do, or that they deem for the benefit of their inhabitants. Then, perhaps, it may safely be left to the legislature, representing the people of the entire state, to enact restrictions upon the activity of all cities, whenever any particular city shows by its eccentricities that it is necessary to do so. The theory is that when the cities start with a complete grant of powers it will be extremely and increasingly difficult for the legislature to withdraw from all the cities of the state any powers which they might properly exercise; that the legislature will be restrained by the public opinion of the state and by the united power of the cities of the state from improperly limiting the powers granted by the constitution.

No one can tell just how this plan would work in practice, but if this power to place limitations upon home rule by general law were made subject to the referendum so that no legislature controlled by a boss or a partisan machine would have the authority to take away any powers from the cities without having that legislation subject to the popular veto, this power conferred

upon the legislature would not seem to be an unsafe grant. The cities ought to be endowed with the broadest powers and duties of home rule, and then if the people of the state desire subsequently to limit these powers in specific ways, at particular times, they should have the right to do so.

The only other point I wish to speak of to-day, and this was not touched upon at all in Professor McBain's paper, is with reference to the protection of the future. I know that the Citizens' Union, in preparing its campaign issues for constitutional convention delegates, put down, as one of its planks, a demand for a provision in the constitution forbidding the grant of perpetual franchises. I agree with that, but I feel that a prohibition of the grant of perpetual franchises means substantially nothing, unless some limitation a long way short of perpetuity is required.

In our constitutional law, we ought to make some provision limiting the grant of franchises—to refer to that subject alone—in such a way as to preserve to every generation of electors in every city, the right, without undue handicaps, to undertake the acquisition, ownership and operation of their utilities, if they so desire; and of course it is wholly impossible to preserve to the future this means of home rule, if we leave the cities of the present day so much home rule that they can give away their streets forever, if they choose. Municipal home rule should be limited to the right of the cities in this generation to control the affairs of this generation.

ROBERT S. BINKERD

Secretary of the City Club of New York

I feel that Professor McBain has performed a very real and friendly service to a great cause in setting forth the difficulties in the way of its achievement. We must be perfectly clear as to what conclusions are to be deduced from the experience which he has recited for us.

It seems obvious that the insertion of a few loose sentences in a state constitution does not establish a stable system of municipal government, free in all that concerns municipal

affairs. It must be equally plain that the constant attempt absolutely to eliminate the legislature transfers the whole problem to the courts, with results not in the least satisfactory. This line of endeavor also leads us to no kind of solution.

The little group of men in this state who have made the term "municipal home rule" have the meaning and vitality attained by it in the last few years have realized this fact from the very start. We have realized that the great systems of stable home rule in Europe are founded not upon constitutional provisions but upon legislation, and we should have been willing to accomplish our entire program in this state by legislation were that legally possible.

Far from pursuing the loose theories, to call them no worse, followed in some of the western states, we have pursued a diametrically different policy. The West has placed its entire emphasis upon the right of a city to control the form of its municipal organization. Those of us in the state of New York who have been working on this problem recently have put our whole emphasis upon the fact that home rule is essentially a question of the breadth and sufficiency of the legal powers with which a municipal corporation is clothed. Therefore, long before we thought of raising seriously the question as to the form of municipal organization, we sought to establish, for the first time in the history of the state, a common pool of municipal powers which each city of the state shared with every other city. That was the object and the partial accomplishment of chapter 247 of the laws of 1913.

It is not possible, without constitutional change, to pursue this program to its ultimate conclusion, for these reasons:

First, the rule of construction regarding municipal law has to be changed, so that instead of everything being construed as against the probability of a city having power to do anything, the municipality shall be assumed, *prima facie*, to have power. In order to accomplish that exact reversal of the rule of construction, we must amend our constitutions.

Second, though we should not in the least seek to eliminate the exercise of the legislative power, either in matters of state concern, or even in the definition and re-definition and expan-

sion of the municipal empowering act, yet we do need by constitutional definition to confine the action of the legislature to general municipal law.

Once deprive the legislature of the opportunity to treat a particular city in a particular way, as though it had absolutely no reference to a municipal system in existence in the state, and we are entirely willing to take our chances with the legislature, because we know perfectly well that if the forty-nine cities of this state have a common interest in an identical list of powers, conferred upon them by the legislature, the legislature cannot invade that pool of powers except over our dead bodies.

Third, we need constitutional change, because the decisions of our highest court have been exceedingly technical upon the question of what is and what is not a delegation of the lawmaking power. In order to stimulate a highly desirable local initiative in re-framing the forms of our municipal organization, so that this group of powers may be well exercised, we need to clear up this question, so that the state may be able to permit the people of its cities to devise and to change their city charters.

The above is all that we seriously require in a constitutional way. I believe that Professor McBain will agree with me that the pursuit of this policy eliminates the most troublesome questions which have arisen in the general municipal experience in the United States, and that our decision to trust to the legislature the legislative power, provided it is confined to real, general legislation affecting our cities, is a safe and sane method of bringing about municipal home rule.

WALTER T. ARNDT

Executive Secretary, Municipal Government Association of New York State

So much has been said about the powers of cities, and the legal and constitutional aspects of the municipal-home-rule problem, that I am not going to address myself to that at all.

I think there are some phases of the home-rule movement, however, some points in the struggle that we have been waging in this state for municipal home rule, that may well be empha-

sised at this time, because they have a very direct bearing upon what we may expect after we succeed in writing into the constitution a broad, far-reaching home-rule provision. There is more than a grain of truth in the proposition that municipal home rule, its practice and its application, depends almost as much on men as on measures, and it is this personal aspect of the thing, the personal and political aspect of it, that I want to consider.

The personal equation certainly does enter into the home-rule question just as it must enter into any problem where there remains a certain amount of discretion in the enforcement or limitation of statutes. To some extent, this has been indicated in the paper of Professor McBain, who has shown that there is a great deal of difference in the actual degree of home rule enjoyed in the several states, the provisions in whose constitutions would seem to indicate that they possessed an equal share.

Home rule, to be effective, must be something more than a theory or set of principles. It is not enough to write a strong home-rule provision in the constitution, and follow it up with the enactment of laws based on that provision. That, of course, is necessary; we could not have real home rule without it; it is for that we are fighting in this state now. We must insist that these principles be incorporated in statutory form; they must be as far-reaching as possible, and as clear and explicit as they can be made. But the most far-reaching provision will be of little real value in solving the great problems of municipal home rule unless the principles are practised. Practice is the personal aspect; that is where the personal equation comes in. It is this personal equation that we must depend on to see that the home-rule provision, once it is incorporated in the constitution, does not become a dead letter. We have got to wipe out once and for all from the minds of the men who administer the law the idea that the presumption is in favor of the power of the state in every debatable crisis, just as surely as we have to wipe off from the statute books the presumption which is now given the force of law. I believe that we can accomplish this result. I believe that the lawmakers and the municipal authori-

ties are tired and disgusted with the old system, the system that has probably given rise to more serious problems of administration, and to more waste and extravagance than any other in the administration of our statutory law.

Few men to-day will go so far as to say they do not believe in municipal home rule. As a general proposition, they all agree they do believe in it, but they are very apt to add an "if" or a "but" that changes their whole meaning, and it is our particular mission to eliminate those "ifs" and "buts."

The campaign we have been waging in behalf of municipal home rule in this state for the past few years has been necessarily a campaign of education; but we have not been, happily, dependent entirely on the logic of our arguments. We have been helped by certain elements or factors which are worth considering and analyzing now, as they must be considered and taken account of later, after we have been successful in writing a home-rule provision into the constitution.

During the past three years, in connection with the campaign for home rule conducted by the Municipal Government Association, I have had an opportunity to consider these factors at close range. They are all political and they are all practical. I might say they are all personal.

I refer to these three elements in particular: the attitude of the municipal authorities; the attitude of the party leaders, particularly the party bosses; and the attitude of the lawmakers. The attitude of the courts, of course, is a determining factor in the proper and successful enforcement of any constitutional provisions, where there is placed on the courts the burden of deciding the scope or extent of any law passed under the home-rule provision; but that can be left out of consideration here for the reason that its bearing is rather on the construction of the statute as passed, than on the influences that make or may make such a statute practical and possible of enforcement.

First, take the point of view of the local boss, the political leader, if you will. It is, perhaps, the least important of the three, and possibly the least worthy of serious consideration. Yet as part of the personal equation it is important. His organization or machine will thrive, must base its plea for the

favor of a local electorate on what it can do for the city; on the sort of administration that the officials it puts into office can give. Slowly but surely the local boss has come to see that he can accomplish more, that the officials his organization puts into office can make a record of real achievement more easily, if they themselves have the power to do things. He prefers to shoulder the responsibility if he may have the increased power. If he must depend upon the legislature, if he has to go to Albany every time he wants anything—and I am considering this purely from the selfish and narrow point of view of the practical politician—anything that he thinks he needs to help out his local party machine, he meets certain difficulties at once.

The legislators from his district may be of opposite political faith, in which case he cannot accomplish what he wants through them unless he can prevent their seeing the motive behind his desire. If he has legislators that he can command, and sends them to Albany with laws that he wants enacted, then he is confronted by another difficulty. The legislature may not happen to be of his political faith, and, even if it is, he has to start in, or his representative at Albany has to start in, on a long lobbying program of dicker and trade and bargaining to get what he is after. If he lacks influence, or if he is unable to strike a bargain, he is very likely not to get it in the end. And after all this there is the governor's veto to consider. Thus the municipal boss has found out that it is difficult to obtain through Albany anything that will help the local machine. Purely from the personal and partisan point of view, therefore, he is inclined to be an advocate of home rule. The importance of this to us is that we can probably count on the help and friendship and interest, in putting through proper home-rule provisions, of the very individual whom we might for many reasons expect to be the last man in the state to agree that cities ought to have home rule.

Then take the problem of the local municipal official with whom inability to "do things" is an even more serious difficulty than with the political boss, because he has certain things to accomplish, and it is more than likely, after he has been in office

a little while, that he finds he cannot accomplish them without additional power. He is handicapped in every possible way, and at every step. A thousand problems probably arise in the administration of even the smaller cities of the states every year where some official sees something that needs to be done and tries to do it; where the mayor wants to put a certain policy into operation: where the head of one of the departments wants to enlarge his powers in a perfectly proper way. He finds that he cannot do it, or, at any rate, he does not know whether he can do it or not, which amounts to the same thing. For, under the existing system, wherever there is any doubt about the power of a city, the only safe way to do, and the practice that is invariably followed, is to go to Albany and try to get the legislature actually to grant the power, so that there may be no question of its existence.

This difficulty has been brought home so emphatically and vitally to every mayor in the state that at present we find the mayors of the state virtually unanimous in their demand for home rule. They have a strong organization known as the State Conference of Mayors. That conference is made up for the most part of practical politicians; men with no very definite ideals or ideas, in many respects, as to civic problems or political principles. They are, nevertheless, facing a hard problem of administration, and no matter what the impelling motive may be, there is not one of them who does not want to make a record as mayor. There are few mayors, of course, who have not enough interest in their city to want to benefit it, yet they find with the cities hobbled as they are it is almost impossible; therefore they too have come to see the vital necessity for a greater degree of municipal home rule. Thus they are influenced, and influenced strongly, to support the home-rule proposal, and in this state it is a matter of great importance to the home-rule movement that the mayors in their annual conference have, for two years past, advocated the very constitutional amendment which Mr. Tanzer has framed, and which the Municipal Government Association has put forth.

Finally, as a factor in this situation, there is the legislature, the lawmakers. We usually assume that the legislature is the

chief stumbling-block in the way of home rule; that it is its jealousy of its own powers which prevents its delegating those powers to others. As a matter of fact, that is probably, and has been, to a large extent, true, but as legislation has increased in volume — and it has increased enormously in this state, — the proportion of local legislation to the whole body of laws considered has increased even more rapidly, and the legislature finds itself absolutely swamped with local laws, local bills, which it is compelled to consider. Of course it cannot consider this mass of proposals as a body, in any intelligent manner. It has to take somebody's word for something. The members are tired of barter and trade on these matters. It used to be thought an excellent thing for a member to go to Albany with his satchel full of measures that he could trade for the support of other legislators. He used to have the notion that he could easily get his measures through in that way, but he soon found that there were too many slips in such a method. If he failed he was compelled to go home empty-handed and explain to his constituents. If he has not been able to get the legislature to validate the bonds of his home city, to authorize the construction of a bridge over a certain creek, or appropriate money for a stretch of state road in his district, the farmers are up in arms against him for that failure. Explanations count for little. They may want a new primary law or a workmen's compensation act, but not at the price of local improvements. So he discovers that a system that makes him responsible for the passage of a measure in a body where he has only one vote out of a hundred and fifty is not entirely satisfactory. He comes to consider it a burden and not a help, and he is glad to get rid of it. We have found in the last two years, in our work in the legislature, that the members of the legislature are rather eager to support some proposal that will tend to relieve them of this burden.

Therefore I think we have the assurance that we shall have the lawmakers with us, not only the present legislators, but all those that have been trained in lawmaking within the last decade. All this promises well for the carrying out, both in letter and in spirit, of any home-rule mandate contained in the new constitution.

To sum up, the point I have been trying to make is this: that given a far-reaching provision in the new constitution providing for municipal home rule, we must have an intelligent, well-directed home-rule spirit awake in the state to make it effective. There does exist a real demand for home rule. We have come about to the end of the preaching stage. I believe that the work of the last few years has developed, in the state of New York, the necessary spirit. There is a fertile field to work in. If we can secure the incorporation of proper home-rule provisions in the constitution to be drafted next year, I believe that we shall have an easier time putting them into operation, and having them lived up to and accepted in spirit as well as in letter, than a great many of these western states have had which have accepted the thing first and thought about it afterward.

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